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No. 76-1209

In the Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

JOE STEWART, ROY TOLBERT, JO ANN KELSEY, ISAIAH HATCHER, and ARTIS OSBORNE
For Themselves and For All Other Persons Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review the factual findings of the district court, as approved by the court of appeals, that plaintiffs had established a violation of Title VII by showing discriminatory promotional policies as evidenced by an absolutely segregated work force in the hourly clerk's position, a salaried work force that is overwhelmingly

white and procedures that are "ripe with susceptability to discriminatory practices?"

2. Is otherwise probative evidence on the work force produced by petitioner's promotional practices barred by a statute of limitations?

3. Does this Court's decision in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), limit evidence in a Title VII class action solely to a one-to-one matching of individual black class members against white incumbents and require the trial court to ignore evidence establishing that the practices used in filling the positions are discriminatory and that the resulting work force is virtually segregated, where matching is impossible because the employer had no objective standard to measure whether a given employee deserved a promotion?

4. Is it consistent with Title VII and due process for back pay to be awarded on a basis where each class member must individually come forward and where because of defendant's wrongdoing rating individual class members against white incumbents is impossible and would mean no compensation whatsoever?

STATEMENT OF THE CASE

This is the third court of appeals decision condemning the promotional policies and practices of petitioner General Motors Corporation. See also *Senter* v. *General Motors Corp.,* 532 F.2d 511 (6th Cir. 1976); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972). As in the other two cases, plaintiffs proved by direct testimony that defendant's promotional policies resulted in two levels of discrimination at the Broadview facility. First, black hourly employees were treated less well than white employees in terms of access to promotions to the preferred hourly positions. Second, black employees did not have

equal opportunity for promotions to salaried positions in the office and supervisory roles at the plant.

This class action[1] came on for trial in June, 1975. The trial court, after hearing the testimony of some fourteen witnesses, found that petitioner's policies and practices violated Title VII of the Civil Rights Act of 1964. The district court found that in filling salaried vacancies petitioner did not make any announcement of openings provided no job descriptions and no application procedure, conducted no regular rating systems, relied heavily on supervisory recommendations to identify persons to be considered for promotion under a "procedure that is highly subjective and loosely structured" and supplied the supervisors with criteria for recommendations that are "at best vague and ill defined." (App. 30, 32.) Procedures in determining promotions to the desirable position of hourly clerk were found no better. (App. 27). The discriminatory potential of these procedures was corroborated by the results they produced: a completely segregated hourly clerks work force from which blacks were totally excluded and a salaried work force that was virtually all white, despite the presence of a number of highly qualified blacks in the plaintiff class of hourly employees. A finding of discriminatory procedures was entered, and a broad, injunctive decree was issued to remedy this discrimination. (App. 38-44.) However, the request of the plaintiff class for back pay[2] was denied without discussion.

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[1] The trial court had previously certified this matter as a class action under Federal Rule of Civil Procedure 23(b)(2), on behalf of all black hourly employees at the Broadview facility.

[2] Although the court had originally certified the class only for injunctive relief, the plaintiffs in their post-trial submissions renewed their application for class treatment of their claim for an award of back pay. This request was not addressed by the district court.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, and respondents cross-appealed on the denial of back-pay. The Seventh Circuit affirmed the decision below on the issue of petitioner's violations of Title VII regarding its promotional policies and practices and approved, except for a minor modification, the broad remedial decree. On the cross-appeal, the Seventh Circuit on the basis of *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), found plaintiffs' claim for class-wide back pay meritorious in light of the finding of class-wide discrimination. The court then enunciated guidelines to be followed in determining back pay, in large part adopting principles that had evolved in a number of cases in the Fifth Circuit. See, e.g., *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *United States* v. *United States Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975). It remanded the matter to the district court "with instructions to award back pay within the constraints of the guidelines . . ." it had announced. (App. 10.)

Petitioner sought rehearing and rehearing en banc, which were denied with no judge in active service requesting a vote. (App. 19). Petitioner did not move that the mandate be stayed pending *certiorari,* and this matter has been proceeding in the district court on remand since January of this year. Pursuant to the decree an EEO committee consisting of three class members and three management representatives, headed by a neutral, has been constituted. At the present time the parties are attempting to negotiate the ground rules for the EEO committee, and steps are being taken with regard to implementation of the remedial decree.

ARGUMENT

I. The Evidence—A Subjective, Informal Promotional System And The Resulting Work Force—Taken As A Whole Supports The Findings Below That Title VII Has Been Violated.

Petitioner asserts that the decision of the district court and the court of appeals are based "solely" on statistics. (Pet. at 1, 13.) This is incorrect. The district court heard the testimony of more than a dozen witnesses as to how promotions were actually made at Broadview. To correct this misimpression and to demonstrate the factual basis for the decision in this case, the facts found at trial are presented below.

Petitioner's Chicago Parts Distribution Center at Broadview, Illinois is essentially a warehouse operation where parts are received both from company and outside suppliers, placed in stock and then shipped to dealers as orders are received. (App. 21.) The Broadview facility, which is General Motors' largest non-union facility in the United States, also serves as the headquarters for the north central region of the Parts Division. (Id.).

The labor force at Broadview is comprised of hourly and salaried workers. The hourly work force is divided into two shifts, a day shift and a night shift. There are six hourly positions at Broadview, of which the most desirable is the position of hourly clerk.[3] (App. 22.) At the time

[3] The hourly clerk position is free from manual labor and allows workers with some education to use their skills. Historically, hourly clerk has served as a stepping stone at Broadview to advancement to salaried positions and supervisory roles. Thus, of the 39 workers whose hourly clerk positions terminated for all reasons (death, retirement, etc.) between 1960 and 1973, 17 were promoted

(Footnote continued)

this suit was brought, although approximately 25 percent of the plant work force was black, blacks were absolutely excluded from the position of hourly clerk at Broadview. (App. 22.) There were twenty-seven hourly clerks, all of whom were white. This racial exclusion continued through the time of trial. In June, 1975, when the case was tried, of the 31 hourly clerks positions 28 were held by whites. As the trial court noted the three black clerks all served on the "less desirable night shift" and all 20 day clerks were white. (Id.)

The trial court expressly rejected date of hire as an explanation for the segregation.[4] (App. 26-28.) Nor could an explanation be found in petitioner's stated, neutral policy that vacancies in hourly clerks positions were to be made on the basis of "ability, merit and capacity." There was absolutely no evidence that black hourly employees as a class had less "ability, merit and capacity" as compared to white hourly employees,[5] and indeed petitioner for some years regularly employed blacks as temporary or relief clerks. In fact, petitioner disclaimed reliance on a merit system at trial. The trial court concluded that petitioner had used an informal, unstructured system favoring whites over blacks for the job, and held petitioner in violation of Title VII in regard to promotions to the hourly clerk position. (App. 28.)

The trial court similarly found that petitioner's promotional practices in filling vacancies in salaried positions at the Broadview facility favored whites over blacks. The court concluded that petitioner's practices taken as a whole "are ripe with susceptibility to discriminatory practices." (App. 30.) Prior experience in a salaried position with petitioner was a prerequisite for consideration for a salaried vacancy in a position above entry level, although petitioner conceded that blacks historically had been denied access to entry level salaried positions. The company at no time provided employees with any description of salaried jobs or any list of the qualifications and prerequisites for salaried positions. (App. 35.) Moreover, the company at no time made any announcements of salaried vacancies to its employees. (Id.)

(Footnote continued)

to salaried positions. As the trial court noted, "the stepping stone nature of the post is even more apparent if the three workers who retired, the two who died and the one who was discharged are eliminated from the total." (App. 22.)

[4] At trial petitioner tried to take refuge in the "bona fide seniority system" defense of section 703(h), 42 U.S.C. § 2000e-2(h). It contended that the complete exclusion of blacks from the position of hourly clerk was the result of whites having uniformly higher seniority than any blacks (evidently because of hiring discrimination now barred by the statute of limitations). However, both the trial and the appellate court rejected this defense, concluding that "the evidence indicates that seniority in fact has often served only an ancillary role in determining promotions to the position of hourly clerk." (App. 23.)

[5] Indeed, several of the named plaintiffs were, if anything, overqualified for the position. Plaintiff Stewart at the time of trial was an eleven-year hourly employee with a bachelors degree, a masters degree, and was working toward his doctorate degree. While in the military he had demonstrated his ability to handle extensive clerical responsibilities and for his work had received commendations from senior officers. Plaintiffs Hatcher and Tolbert were both college graduates, had completed their college education while working at Broadview as hourly employees, and were permanent substitute teachers during the day in the Chicago public school system. Neither was ever offered an opportunity to serve as an hourly clerk.

Instead, the company "seems to rely heavily on supervisory recommendations." (App. 30.) The former plant manager, in uncontroverted testimony, admitted (and the court below found) that it was the foremen who supplied the "two or three critical names" used in the selection process.[6] (App. 32.) But the foremen had no objective information on which to rate the hourly employees, since the only formal reviews were at the supervisory level. Foremen were not provided with written guidelines to use in their evaluations and indeed were not even informed of the specific salaried position for which they were making recommendations, leading the trial court to observe that the foremen "could hardly know what to look for since they never knew the official job description or personnel criteria used." (App. 32.) Instead, foreman were merely told to supply the names of employees with "potential for promotion," a standard found not to be a "meaningful criteria" and one that "easily becomes a subterfuge for discrimination." (App. 34.) Plaintiffs' expert confirmed that the absense of a formal rating system and the lack of objective criteria and foreman guidance contributed to racial bias in the recommendation process.

The salaried work force reflected the results of these promotional practices. There were four salaried depart-

[6] Petitioner had 18 foremen making recommendations and supervising hourly employees at Broadview. Until 1970 the foreman work force was totally segregated; even at the time of trial (and two years after the case was filed) 16 out of the 18 foremen were white. There were four general foremen, and at all times this position had been exclusively white, as were the positions of plant supervisor, office supervisor and plant superintendent. Plaintiffs' expert witness demonstrated that a promotion system bottomed on this sort of recommendation is inherently discriminatory.

ments at Broadview. As of December 1972[7] one of the departments, traffic, had an entirely segregated work force and the number of blacks in the other departments was miniscule:

Department	Number of White Employees	Total Employees	Number of Black Employees
Operations	24	25	1
Office and Clerical	57	59	2
Personnel	7	9	2
Traffic	5	5	0
All Salaried Positions	93	98	5

Any explanation based on the inherent inferiority of blacks for these positions could only be rejected out of hand, and in fact at least four members of the plaintiff class were college graduates.

The trial court thus had before it, in finding a violation of Title VII, substantial evidence on the discriminatory policies of petitioner's promotional practices, as well as the racial composition of the salaried work forces produced by these procedures. Liability was not based "solely" on statistics, as petitioner now claims (Pet. 1, 13), but on a thorough investigation of the actual mechanics of promotions. Certiorari to review the adequacy of the factual conclusions of the trial court about these practices and procedures does not seem warranted, especially since essentially the same subjective and informal promotional policies of this very employer have previously been condemned by two other appellate courts after full trials. *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th

[7] The experience since 1972 to date of trial was found by the trial court not to be "statistically significant." (App. 29.)

Cir. 1972). Employers are routinely found liable under Title VII for similar promotional practices. E.g., *Mueller* v. *United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1974), *cert. denied*, 423 U.S. 825 (1975); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Bolton* v. *Murray Envelope Corp.*, 493 F.2d 191, 193 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

The cases on which petitioner relies (Pet. 16-17) merely restate the principles applied by the Seventh Circuit and the trial court.[8] After a court has identified promotional practices "highly susceptible to abuse" (App. 9), it can verify their illegality by a statistical analysis of the resulting work force. E.g., *Rich* v. *Martin-Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1171-73 (2d Cir. 1972); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972). Cf. *McDonnell Douglas* v. *Green*, 411 U.S. 791, 805 (1973). Petitioner contends (Pet. 17) that the decision below mandated "statistical parity." All that the courts below held was that blacks as well as whites are to have an opportunity for promotion on the basis of merit. Statistics and direct testimony had revealed that in the past and up to the time of trial, petitioner's promotional practices had worked to favor whites and to disadvantage blacks.

[8] Thus, *Hester* v. *Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974), recognizes the evidentiary significance of a disparity between blacks in the relevant population and in a particular desired position. *Olson* v. *Philco-Ford*, 531 F.2d 474, 477 (10th Cir. 1976), recognizes that statistics as to recurrent employment decisions may reveal that employment policies and practices in fact discriminate against blacks. *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 271 (10th Cir. 1975), notes that "racial statistics are an entirely appropriate method of proving a prima facie discrimination. . . ."

Far from giving any group a preference, the decisions below merely decreed fair and open procedures—posting of job openings, application forms and procedures, explanations of hiring decisions—so that all would be assured not statistical parity but equal opportunity, the goal of Title VII.

After a full trial on the merits, petitioner was found to employ promotional policies and practices that disadvantaged blacks as compared to whites in promotion to the preferred hourly positions and to salary positions. In reaching this conclusion, both the trial court and the court of appeals took into account substantial direct evidence of the discriminatory potential of petitioner's procedures, which they found confirmed by the work force produced by these procedures. In this, the lower courts were according traditional evidentiary weight to persuasive and relevant evidence and did nothing that could conceivably be said to conflict with the prior decisions of this Court or the more than 120 courts of appeals decisions employing statistical evidence in Title VII. Petitioner's argument boils down to a rehashing of the evidence, not grounds for the grant of certiorari.

II. Evidence Establishing The Discriminatory Impact Of Petitioner's Procedures Is Not Inadmissible Because Of Any Statute of Limitations

Although petitioner has used the same promotional system since at least 1965, it suggests that the applicable statute of limitations barred the courts below from drawing any inferences about the discriminatory impact of the practices from its pre-1969 promotions. Petitioner's argument confuses admissibility of evidence with limitations on causes of action. See *Machinists Local* v. *NLRB*, 362 U.S.

411, 416, 420 & n.11 (1960).[9] Respondents pleaded and proved that petitioner's procedures for filling salaried and hourly clerks' vacancies at the Broadview facility had been unchanged since at least 1965, and that during this earlier period a segregated work force had been produced. Since it tended to explicate the discriminatory potential of those procedures, evidence of racial discrimination at a prior time is relevant and admissible. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 218 (5th Cir. 1974) (cases collected); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1347 (8th Cir. 1975).[10]

III. Evidence Other Than Comparing White Incumbents With Black Class Members Was Probative On The Discriminatory Impact Of Petitioner's Policies

Petitioner contends that under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the respondent class could establish discrimination only by demonstrating each individual promotional decision was discriminatory. But an employee-by-employee matching was, as the Court of Appeals observed, impossible "because General Motors had no objective standards by which to measure whether a given

[9] This distinction has long been drawn in NLRA proceedings. Section 10(b) of the NLRA, 29 U.S.C. §160(b), the parallel provision to Title VII's limitations provision, 42 U.S.C. §2000e-5(e), "enacts a statute of limitations, not a rule of evidence." *Allen Mfg. Co.*, 88 N.L.R.B. 761, 766 (1952). Evidence as to events in the barred period can be used to illuminate current conduct in and of itself charged to be unlawful. See generally *Machinists Local* v. *NLRB*, 362 U.S. 411, 420 & n.11 (1960) (cases collected).

[10] Indeed, it does not appear that petitioner made any objection to questions addressed to its foremen and former plant manager on pre-1969 procedures.

employee deserved a promotion . . . ." (App. 13.) Petitioner can hardly limit respondents to a mode of proof that its own wrongdoing had rendered unavailable.

McDonnell Douglas requires no such departure from traditional modes of proof. As the courts below noted (App. 9, 34), racial discrimination in a class action in inferable from procedures with a propensity to unfairness and subjectivity and from the resulting racial disparity in preferable positions: since comparative ability is not at issue, discriminatory procedures are the only explanation for why whites have the jobs and blacks do not. *McDonnell Douglas*, in contrast, was an individual action brought by a discharged employee challenging the employer's refusal to rehire him after it advertised an opening in his former position. Evidence of the particular hiring decision in the position sought and refused was at the heart of Green's individual claim. *McDonnell Douglas* was expressly limited to "a private nonclass" action, 402 U.S. at 800, and the Court noted that the elements of proof will vary in other Title VII actions and that statistical evidence is a useful indicator of patterns of discriminatory practice. 411 U.S. at 802 n. 13, 805. Court after court has, therefore, held since *McDonnell Douglas* that in class Title VII cases, evidence of wholesale exclusion creates the same inference of impermissible procedures as do facts regarding particular hiring decisions. See, *e.g.*, *Jones* v. *Lee-Way Motor Freight Inc.*, 431 F.2d 245 (10th Cir. 1970); *Herrera* v. *Yellow Freight System*, 505 F.2d 66 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1317 (7th Cir. 1974).

IV. The Court Of Appeals' Guidelines For The Award Of Back Pay Follow Conventional Principals In Assessing Damages

On respondents' cross appeal on denial of back pay, the Seventh Circuit's analysis was conventional. It first inquired whether back pay should be awarded on an individual basis to particular employees or on a class-wide basis, with a lump-sum award to be divided among eligible class members. (App. 12.) It noted that an individual remedy should be used if it will best compensate the victims of discrimination without penalizing the employer, and held that individual awards based on seniority should be made in regard to promotions to hourly clerk. It found, however, that "because General Motors had no objective standards by which to measure whether a given employee deserved a promotion (App. 13)," it was impossible to decide in individual cases whether but for racial discrimination a particular person would have been promoted to a salaried position. Rather than achieving greater accuracy, individual awards in the case of salary promotions would necessarily involve a "quagmire of hypothetical judgments (App. 13)," in which there is nothing approaching accuracy and the only result would be petitioner escaping its obligations to make members of the respondent class whole.

The Seventh Circuit therefore held that the district court should first identify those black hourly employees who by virtue of their education, their training or other factors are eligible for salaried back pay at the Broadview facility. Petitioner then has an opportunity to show that these employees would not have received salaried positions because of factors unrelated to discrimination. (App. 14.) It is among those persons who survive petitioner's proof

to whom a "class-wide" award is to be made. Although petitioner's total dollar liability is to be calculated by comparing over time groups of like employees, contrary to its suggestion (Pet. 25) it will have a full opportunity to demonstrate that any individual should not be entitled to participate in the class-wide award, thereby according full due process. Moreover, the mechanics of computing the dollar amount to those class members who were disadvantaged is consistent with Title VII's make-whole remedy and in fact employs techniques developed in a number of other circuits where the employer's wrongdoing makes a more precise form of dollar amount calculation impossible. E.g., *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-2 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); *Senter* v. *General Motors Corp.*, 383 F. Supp. 222, 229 (S.D. Ohio 1974), *aff'd*, 532 F.2d 511 (6th Cir. 1976); *United States* v. *Local 416, Wire & Metal Lathers*, 328 F. Supp. 429, 443-45 (S.D. N.Y. 1971).

CONCLUSION

For the reasons here stated, it is respectfully submitted that a writ of certiorari be denied.

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